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In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 105

MIDLAND LAND AND IMPROVEMENT COMPANY, appellant

v.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 26) is reported in 58 Ct. Cls. 671.

JURISDICTION

The judgment to be reviewed was entered on April 2, 1923. (R. 31.) A motion for a new trial was made June 1, 1923, and denied February 18, 1924. (R. 31.) Appeal was taken May 15, 1924 (R. 31), under Section 242 of the Judicial Code (later repealed by the Act of February 13, 1925, Chap. 229, 43 Stat. 936, 939).

THE QUESTION

The action was based upon a dredging contract between the plaintiff in error and the United States. The work was partly performed by the contractor, and for this he was paid the contract price, less a percentage retained as provided in the contract, to insure completion. The contractor then ceased work, and the United States treated the contract as broken and relet the work to another and applied the retained percentages owing to the contractor to cover the increased cost resulting from the reletting. In this action the claimant sought to recover the retained percentages of the contract price on the work performed by the claimant. *The main question in the case is whether the United States was justified in treating the contract as broken and reletting the work to another and applying the retained percentages to cover the resulting additional cost.*

STATEMENT

The facts as found by the Court of Claims are as follows:

The plaintiff, a New Jersey corporation (R. 18), on August 12, 1907, entered into a contract with the United States to dredge and dispose of 4,177,110 cubic yards of material in the Newark Bay and Passaic River for 16¼ cents per cubic yard. The work was to dredge a channel sixteen feet deep at mean low water from Staten Island Sound, through Newark Bay and the Passaic River to Montclair

and Greenwood Lake Railroad bridge, a distance of 10.8 miles, 300 feet wide, to the Nairn Linoleum Works, a distance of 9.7 miles, and thence 200 feet wide to the Montclair and Greenwood Lake Railroad, 1.1 miles (R. 18), such work to be prosecuted "with faithfulness and energy" (R. 18).

The specifications, among other things, provided that:

> A percentage of ten (10) per centum will be reserved from each payment until half of the work under the contract, as estimated by the engineer, has been completed, after which there shall be no further reservation. (R. 18.)

The specifications also contained a statement that:

> *The material to be excavated is believed to be mud, sand, and gravel, but bidders are expected to examine the work and decide for themselves as to its character and make their bids accordingly, as the United States will not guarantee the accuracy of this description. The price per cubic yard will cover the removal of all material encountered, except ledge rock.* (R. 18–19.)

Also that:

> The required rate of work will be at least 50,000 cubic yards per month, unless otherwise authorized by the engineer. If at any time after the date fixed for beginning the work it shall be found that operations are not being carried on as rapidly as required

> by the contract, the engineer shall have power, after due notice in writing to the contractor, to employ such additional plant or labor, or to purchase such material as may be necessary to insure the proper completion of the work within the time specified, and the excess cost thereof shall be a charge against any sum due or to become due to the contractor. This provision, however, shall not be construed to affect the right of the United States to annul the contract.

Also that:

> No work will be required in the months of December, January, and February, but it may be continued in these months if the contractor so desires. (R. 19.)

On August 3, 1911, the appellant entered into a supplemental contract with the Government to widen the channel opposite Lister's Chemical Works about 4,500 feet above the beginning of the channel in Newark Bay and at any bends of the Passaic River below the end of the channel at Montclair and Greenwood Railroad bridge, the amount of dredging not to exceed 10 per cent of the amount stated in the original contract and the contract to be governed by the same specifications as the first. (R. 19.)

The original and supplementary contract and specifications which are attached as an exhibit to the petition (R. 3–11) are made a part of the Findings by reference. (R. 19.)

The contract was made after an invitation for bids and receipt of sealed proposals. The appellant's proposal, dated June 30, 1907, stated:

> The manager of this plant has been engaged in this class of work for many years, i. e., Hudson River U. S. contract, 1900 to 1906, completed O. K.; Newark Bay and Passaic River, 1904 to 1906, completed O. K.; Great South Bay, 1904, completed O. K.; Patchogue River, 1906, completed O. K.; Staten Island Sound, 1906, completed O. K.; and at least 50 other contracts. *We make this proposal with full knowledge of the kind, quantity, and quality of the work required,* and if it is accepted will, after receiving written notice of such acceptance, enter into contract within the time designated. (R. 19.) (Italics ours.)

The manager referred to was John A. Seeley, who made the estimates for the plaintiff's bid, and he was familiar with the whole stretch of Newark Bay and Passaic River covered by plaintiff's contracts, his experience extending over a period of eleven years. He had been superintendent of a contract for dredging a 12-foot channel over the same course. (R. 19.)

Under the Act of March 3, 1905, Chap. 1482, 33 Stat. 1117, surveys and borings were made by the Engineer Office in October, November, and December, 1906, of the channel which this contract covered, with a view to deepening the channel from 12 to 16 feet and to determine the character of the material to be removed by dredging.

> The borings were made with a steel rod an inch and a half in diameter, and were driven into the bottom of bay and river by hand power, and the depth of the water and of each kind of material penetrated was recorded. This was the proper and customary way to make borings where the depths of the water and character of the bottom were such as was found in the channel proposed to be dredged. (R. 20.)

143 of such borings were made and recorded on three separate sheets. Sheet No. 1 covered 2.2 miles and borings 1 to 42, inclusive, and " indicate mud, mud and sand, mud and shells, sand and gravel." Sheet No. 2 covered 3.1 miles and borings 43 to 74, inclusive, " and indicate mud, mud and sand, sand, sand gravel and clay, gravel, and clay." Sheet No. 3 covered 5.5 miles and borings 75–143, inclusive, "and indicate mud, mud and sand, sand, sand and gravel, gravel, sand gravel and clay, and bottom bowlders." Gravel, as the term is used in hydrographic engineering, indicates material running from grit to stones 2 inches in diameter, and bowlder, a word used interchangeably with cobblestones, indicates stones from 2½ to 8 inches in diameter, rounded by the action of water in the glacial period. These borings were made by competent men in good faith and according to their best judgment and whenever they struck a bowlder the fact was recorded, the borings stopped at that place, and they went on to another place for another boring. The material afterwards dredged from the channel

corresponds generally to the material indicated by the borings. These sheets were furnished to prospective bidders. (R. 20.)

The estimate of cost by the Government engineers was 26 cents per cubic yard for the lower reaches of the channel and 32 cents per cubic yard for the upper reaches,

> the difference in estimates being due to the more difficult character of the material to be dredged, and the number of bridges in the upper part of the channel through the draws of which the scows would have to pass. (R. 20.)

Four other bids ranged from 22.2 cents to 36.4 cents per cubic yard. (R. 20.)

In 1905 a company was organized by New York interests and took over the dredging plant used in this contract, and about 3,500 acres of swamp land known as the Newark Meadows, the purpose being to dredge near-by waters and fill in the swamp property. Later, after considerable money had been put into the business, and taxes on the lands had been raised, all of the others, except Harvey Fisk and Sons, withdrew from the business and the Fisks foreclosed the liens which they had on the properties and bought them in. They then formed two companies, placing in one the reclaimed lands and in the other (the appellant herein) the dredging plant, and made John A. Seeley the manager of the plant. (R. 21.)

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Appellant began work under the contract on August 28, 1907, completely dredging the portions covered by boring sheets Nos. 1 and 2 a distance of 2.2 miles and 3.1 miles, respectively, dredging completely one mile of the distance covered by boring sheet No. 3, and dredged half or less than half of the width of the prescribed channel for 2.2 miles of the distance covered on sheet No. 3.

When plaintiff began the work, its plant was sufficient to have completed it in contract time and within two years had completed one-half of the work, and was paid on that basis, less the retaining 10 per cent, or $33,998.15. The plaintiff continued to make good time until the end of the year 1909 and was in excess of the minimum quantity of 50,000 cubic yards per month required by the contract.

> There was no material encountered which plaintiff's plant, before it was allowed to run down, could not handle. It could and did pump clay and cobblestones in its hydraulic dredges, and where stone was dredged plaintiff was paid for dredging them at special prices. After January 1, 1910, the work was carried on spasmodically and the plaintiff was in default nearly every month up to Sept. 24, 1912. During eight months in which work was required no work was done, and in every month except three plaintiff was in default in its monthly dredging work; and in June, July, August, and September, 1912, it dredged 31,926 cubic

yards instead of the minimum required by the contract, 200,000 cubic yards. (R. 21–22.)

On September 24, 1912, appellant stopped work on the contract. The stock of the company had been previously sold for $1,000.

> The plant had been gradually running down until at the time the work stopped it was inadequate to perform the contract. (R. 22.)

On November 1, 1912, appellant wrote to the Secretary of War "requesting the cancellation of the two contracts," the letter stating that:

> We respectfully submit, in support of our position, that the contract should be terminated—
>
> 1. Because the difference in cost between excavating and depositing material shown by the borings, and the excavation and depositing of clay, bowlders, and other hard materials actually found, is so materially different and excessive in cost as to be inequitable and unjust, and to require the excavation and disposal of a mass of material not within the terms of the specifications at the price bid for the former imposes a burden upon the contractor that is inequitable and unjust.
>
> 2. The bid of this company was justifiably based upon erroneous information and data furnished by the Engineering Department.
>
> 3. For reasons given the contract should be discontinued and terminated, all percentages retained should be paid to the contrac-

tor, and this contractor released from all liability thereunder.

4. The work should be readvertised on correct information without prejudice to this contractor.

We respectfully request that we be given an opportunity to be heard in this matter and to submit, if you should deem it advisable, evidence to support the contentions urged above.

We further request that the United States Engineer Office at the city of New York be advised of this application; that a consideration thereof is pending in your office; and that pending this consideration no further action may be taken by him prejudicial to this contractor. (Rec. pp. 22–23.)

On February 8, 1913, the Engineers Office in charge of the work requested appellant to resume the dredging not later than March 1, 1913, and to prosecute the work with "faithfulness and energy" in accordance with the contract, stating that:

> the entire cessation of the work is not contemplated under the contract, although you have attained the required average of progress to date upon same. (R. 23.)

The engineer again wrote to appellant on February 21, 1913, requesting a reply to this question. (R. 23.) The appellant replied on February 28, 1913, stating that:

> We respectfully refer you to our previous correspondence on this subject *wherein we have informed you of our intention to dis-*

> *continue work on this contract for reasons therein specified.* Upon advice of our attorneys we have not changed our position in the matter. (R. 23.) (Italics ours.)

The Engineer's Office, stating "So far as the practical consideration of this contract is concerned, the contractor abandoned work on September 24, 1912," determined that the contract should be annulled, and on March 14, 1913, wrote a letter to the appellant, stating:

> Referring to your letter of February 28, 1913, in which you definitely informed me that you have discontinued work on your contract, * * * I have to inform you that this contract with its supplementary contract * * * is hereby annulled with the sanction of the Chief of Engineers and that arrangements will be made to secure the performance of the uncompleted work in accordance with Paragraph 4 of the contract. (R. 24.)

The appellant never protested as to the character of the material dredged until it requested a cancellation of the contract of November 1, 1912. (R. 24.)

The farther upstream the dredging was done, the transportation of the material dredged became more expensive and the contract less profitable. A considerable part of the 3,500 acres of swamp land was reclaimed by this dredging. The value of such 3,500 acres, after filling, increased $42,000,000. (R. 24–25.)

> After the work was abandoned by plaintiff and the two contracts canceled * * * the uncompleted part of the work was advertised August 16, 1913, on the same specifications, surveys, and borings and was awarded to Eugene Breyman at 26.7 cents per cubic yard, scow measurement, contract dated October 10, 1913, who completed the work. The increase in cost to the Government on the work done under the Breyman contract, over what it would have cost under appellant's contracts, was $141,127.31, being much in excess of the retained percentages. (R. 25.)

Upon these facts found by the Court of Claims, the appellant contends:

1. That it was deceived by the representations made by the Government as to the character of the materials to be dredged.

2. That because of such alleged deception it had a right to refuse to carry out the contract as made and to request a modification thereof.

3. That it did not refuse to complete the contract, but merely requested a tentative suspension of work and a consideration in the meantime of its request for a modification.

4. That in such circumstances the Government had no right to annul the contract and let the work to another contractor.

5. That it is entitled to recover the retained percentages and the Government can not hold the same and apply them to the money the Government lost

because of the differences between the price of the new contract under which the uncompleted work was performed and the contract made by appellant, the appellant contending as a part of this last theory that if the retained percentages are to apply to any losses sustained on the new contract, the Government must show that the new contract, together with the specifications, etc., thereof, were identical with the old contract which was annulled.

The position of the Government is summarized in the argument.

ARGUMENT

SUMMARY

I. There was no misrepresentation by the United States as to the nature of the material to be removed. The United States disclosed to bidders such information as it had, but this disclosure did not amount to a representation, and, besides, the material encountered by the contractor was the same as indicated by the United States.

II. The contractor did not rely on any representation by the United States as to the nature of the material to be dredged. The contract expressly required the contractor to ascertain the conditions for itself, and the contractor from actual experience had more complete knowledge than the United States as to the conditions to be encountered.

III. The voluntary cessation of work by the contractor constituted a breach. The contract did not contemplate a complete cessation of work except during December, January, and February, and required substantial progress in every other calendar month.

IV. The letters written by the contractor amounted to an unequivocal declaration of an intention to finally cease performance, and justified the United States in treating the contract as broken.

V. The contract having been broken by the contractor, the United States was justified in reletting the work and applying the retained percentages to the additional cost incurred in reletting the work. The Findings show that the work relet was the uncompleted part of the work covered by the first contract, and was relet under the same specifications.

Conclusion.

I

There was no misrepresentation by the Government as to the nature of the material to be encountered

The appellant contends that the cessation of work by it was justified and not a breach of its contract, because prior to making the contract the Government misrepresented the character of the material to be removed. The facts bearing upon this point may be briefly summarized as follows:

The Government advertised for bids and referred to specifications which had been prepared. The appellant made a bid after examination of the specifications. The specifications included certain boring sheets which purported to show, and the Government submits did show, the result of actual borings made in a fair manner by competent men. The court below in Finding IV (R. 20) set out in detail the facts concerning such borings, showing that they were made with a steel rod operated by

hand and that "the depth of the water and of each kind of material penetrated was recorded." The court also found that "this was the proper and customary way to make borings where the depths of the water and character of the bottom were such as was found in the channel proposed to be dredged." (R. 20.) The court also in such Finding stated that:

> These borings were made by competent men in good faith and according to their best judgment, and whenever they struck a bowlder the fact was recorded, the boring stopped at that place, and they went on to another place for another boring. (R. 20.)

And as conclusive upon the question which the appellant now raises concerning the alleged misrepresentation by the Government we submit the statement by the court in Finding IV that "the material afterwards dredged from the channel corresponded generally to the material indicated by the borings. These sheets were furnished to prospective bidders." (R. 20.)

We submit that these Findings by the court below, which in accordance with the well-established rules will not be disturbed by this Court, are controlling upon the question of the alleged misrepresentation by the Government. *The court below found that the borings were fairly made by competent men; that they truthfully recorded the result of such borings; and that the material actually encountered corresponded generally to that*

revealed by the borings, all of which information was furnished to prospective bidders (which included the appellant herein) by the Government. Since there was no misrepresentation, the contention of the appellant fails, and such authorities as—

> *Hollerbach* v. *United States,* 233 U. S. 167;
>
> *Christie* v. *United States,* 237 U. S. 234;
>
> *United States* v. *Atlantic Dredging Co.,* 253 U. S. 1;
>
> *United States* v. *Spearin,* 248 U. S. 132; and
>
> *United States* v. *Smith,* 256 U. S. 11;

become inapplicable, as in all such cases this Court found and predicated its opinion upon the existence of a misrepresentation. The case of *MacArthur Bros. Co.* v. *United States,* 258 U. S. 6, is directly applicable.

II

The appellant did not rely on any representations by the United States as to the nature of the material to be encountered

This is so, because (1) the contract required appellant to ascertain these facts for itself; (2) the bid was submitted with full knowledge of the actual existing conditions and the character of the work to be performed, and therefore appellant was not deceived by such alleged misrepresentations. The contract provided that:

> The material to be excavated is believed to be mud, sand, and gravel, but bidders are

> expected to examine the work and decide for themselves as to its character and make their bids accordingly, as the United States will not guarantee the accuracy of this description. (R. 18.)

The appellant in its proposal stated that "the manager of this plant has been engaged in this class of work for many years" (R. 19), and then sets out six specific instances and states "and at least 50 other contracts." Among the instances specifically stated is the "Newark Bay and Passaic River, 1904 to 1906, completed O. K." (R. 19.) It will be recalled that these are the same waters in which the dredging under the contract now in question was to be performed. In its bid the appellant also stated:

> We make this proposal with a full knowledge of the kind, quantity, and quality of the work required. (R. 19.)

The court below found as a fact that—

> The manager above referred to was John A. Seeley, who made the estimates for plaintiff's bid, and who was very familiar with the whole stretch of Newark Bay and Passaic River covered by plaintiff's contract, his experience extending over a period of eleven years, and he had been superintendent of a contract for dredging a twelve-foot channel over the same course. (R. 19.)

The record also shows that appellant must have had some other motive than the compensation to be paid by the Government for this work.

In Finding V (R. 20) it is shown that the Government estimates for the cost of this work were 26 cents per cubic yard for the lower reaches of the river and 32 cents per cubic yard for the upper reaches. The appellant took this work for 16¼ cents per cubic yard for all of such dredging. The other bids ranged from 22.2 cents to 36.4 cents per cubic yard. The motive of appellant becomes apparent by the Findings of the court below, where in Finding VI (R. 21) and Finding X (R. 24, 25) it is revealed that the same financial interests which owned this dredging plant also owned a large area of land located near the place of this proposed dredging, which land was then in process of reclamation by filling; that a large part of the material dredged under this contract was deposited upon this land; and that the reclaimed land, as the result of filling, increased in value to the extent of forty-two million dollars.

The facts relating to the ownership of this land to be reclaimed and the enormous profits made by such reclamation give color to the entire transaction and explain why appellant in this case was willing to enter into a contract to perform this work at a price much below the Government estimates as well as the bids of others. It also colors the contention that appellant was deceived, it appearing from the findings of the Court below that the appellant in this transaction was represented by thoroughly competent men, experienced not only in this line of

work but experienced in the precise area to be dredged under this contract. In these circumstances the provisions of the contract requiring the contractor to ascertain for himself the nature and character of the work to be done should be given full meaning and effect; the statement by the contractor that it did have full knowledge and that such knowledge was acquired in a specific way should be construed to mean what it says; and the contractor, entering into this agreement with his eyes open, fully informed and aware of the things that he should do and the nature of the work that he would be required to perform, and impelled by a motive to gain enormous profits by the reclamation of the land to be filled, should not now be heard to say that the boring sheets misled him to his disadvantage and that he was deceived thereby.

We recognize the general rule, as has been announced in the decided cases in this Court, such as—

Hollerbach v. *United States,* 233 U. S. 167;
Christie v. *United States,* 237 U. S. 234;
United States v. *Atlantic Dredging Co.,* 253 U. S. 1;
United States v. *Spearin,* 248 U. S. 132; and
United States v. *Smith,* 256 U. S. 11;

to the effect that representations by the Government upon a specific matter which proved to be inaccurate and untrue will not be overcome by the general provisions of the specifications of a contract requiring the contractor to ascertain the facts for himself or by the provisions of his bid stating

that he makes it with full knowledge. However, in this case the facts are so strong in support of the contention that the contractor did know of the nature and character of the work to be performed that this case is not within the ruling of this Court in the cases just cited.

III

Complete cessation of work by the appellant was a breach of the contract

The contract in this case, among other things, provided (R. 19) that:

> The required rate of work will be at least 50,000 cubic yards per month, unless otherwise authorized by the engineer. If at any time after the date fixed for the beginning of the work it shall be found that operations are not being carried on as rapidly as required by the contract, the engineer shall have power

to proceed to procure other means of having the work performed. It was also provided that:

> *No work will be required in the months of December, January, and February,* but it may be continued in these months if the contractor so desires. (R. 19.)

Paragraph 14 of the specifications (R. 8) provided that:

> The contractor will be required to commence work under the contract within thirty (30) days after the date of notification of approval of the contract by the Chief of Engineers, U. S. Army, unless otherwise au-

> thorized by the Engineer, to prosecute the said work with faithfulness and energy, in accordance with paragraph 21.

Paragraph 4 of the contract (R. 4) provided that:

> If, in any event, the party of the second part [the appellant] shall delay or fail to commence with the delivery of the material or the performance of the work on the day specified herein, or shall in the judgment of the engineer in charge, *fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements* of this contract (Italics ours),

then the Government would have the right to "annul" the contract and hold all moneys due, including therein retained percentages, and proceed to have the work completed and hold the contractor for the excess cost, if any, of such completion over the price provided for in the contract.

The Government submits that all these provisions taken together require the contractor to excavate at least 50,000 cubic yards during each and every working month, and not, as appellant contends, to excavate an average of 50,000 cubic yards per month. However, if the Government should be wrong in this contention, it is clear that it was intended that some work should be done on this contract during each month after its inception except during the months of December, January, and February. It can hardly be seriously contended

that the entire cessation of work by the appellant during any given month, except those specifically provided for in the contract, was a faithful and diligent prosecution of the work. The contract provides that no work shall be done during the months of December, January, and February. This excludes the idea that during any other months the contractor may fail to do any dredging whatsoever under said contract. If it could fail during any other one month, why could not it also be said that it could fail during any three or four months, or during a month now, another month two or three months later, and so on, until the work would be indefinitely prolonged?

Now, let us see what the facts are upon this question. The engineer officer in charge reported to the Chief of Engineers that *if* the average monthly excavation of 50,000 cubic yards *should be* used as the measure of work required of appellant then the appellant would not be in default until some few months after the date that the contract was " annulled " (R. 24). However, it is definitely shown (Finding VII, R. 21, 22) that:

> After January 1, 1910, the work was carried on spasmodically and the plaintiff was in default nearly every month up to September 24, 1912. During eight months in which work was required no work was done, and in every month except three plaintiff was in default in its monthly dredging work,

> and in June, July, August, and September, 1912, it dredged 31,926 cubic yards instead of the minimum required by the contract, 200,000 cubic yards.

The court below also found (Finding VIII, R. 22) that—

> on September 24, 1912, the plaintiff stopped work on the contract.

The record also shows that appellant never again did any more work upon such contract. (Finding IX, R. 22, 23, and 24.) It is thus conclusively shown that during eight of the months prior to September 24, 1912, when work was required to be done under the contract the appellant did no work whatever thereon; that from September 24, 1912, until the "annulment" of the contract by the Government on March 14, 1913, appellant did not work upon said contract. During such time subsequent to September 24, 1912, the appellant was required by the contract to perform work in the months of October and November and a part of the month of March. We, therefore, respectfully submit that, irrespective of appellant's unequivocal refusal to continue and perform such contract, which will be discussed in the next succeeding paragraph, appellant was in default under the terms of said contract because of its failure to perform work thereon, and as provided in said contract the Government then had the right to "annul" the same and to pursue the remedies provided for by said contract and by the rules of law applicable thereto.

IV

Appellant unequivocally refused to continue performance and thereby committed a breach of the contract

The appellant contends that it did not refuse to perform this contract, but that it merely temporarily suspended proceeding upon the performance thereof pending the determination of its request for modification of such contract. The Government submits that the Findings show, in addition to a default in the performance of the work under the contract, as set out in the next preceding paragraph, that the appellant herein unequivocally refused to proceed further with the contract and thereby committed a breach giving the Government the right to "annul" the contract.

The facts are that after appellant started with great energy and success in the performance of this contract its efforts were diminished until, as said in Finding VII:

> After January 1, 1910, the work was carried on spasmodically and the plaintiff was in default nearly every month up to September 24, 1912. During eight months in which work was required no work was done, and in every month except three plaintiff was in default in its monthly dredging work. (R. 21, 22.)

The appellant finally entirely stopped work upon the contract on September 24, 1912 (Finding VIII, R. 22), and although appellant was supposed to be continuing work under the contract it did not do

so. On November 1, 1912, the plaintiff wrote to the Secretary of War requesting the cancellation of the two contracts, and claiming the right to be relieved of further performance. (This Brief, pp. 9–10; R. 22, 23.)

To this the Engineer's Office replied on February 8, 1913, stating that appellant should—

> resume dredging at the earliest possible date, and not later than March 1, 1913, *and prosecute the work with faithfulness and energy in accordance with the contract. The entire cessation of the work is not contemplated under the contract,* although you have attained the required average rate of progress to date upon same. (R. 23.) (Italics ours.)

And on February 21, 1913, the Engineer wrote the appellant requesting a reply. (R. 23.) On February 28, 1913, the appellant replied and stated:

> We respectfully refer you to our previous correspondence on this subject, *wherein we have informed you of our intention to discontinue work on this contract for reason therein specified. Under advice of our attorneys, we have not changed* our position in the matter. (R. 23.) (Italics ours.)

This letter was referred to the Chief of Engineers, with request for advice "as to the propriety of annulling this contract at this time." (R. 24.) The Chief of Engineers replied:

> *Since the contractor has definitely abandoned the contract,* as evidenced by letter of the 28th ultimo, the contract should be at

> once annulled by giving notice to that effect to the contractor and the sureties, preserving evidence of the receipt of such notices (italics ours);

and that

> after annulment of the contract recommendation as to the method of completing the work, or other course to be followed, should be submitted. (R. 24.)

The engineer in charge then, under date of March 14, 1913, wrote appellant, stating:

> Referring to your letter of February 28, 1913, in which you have *definitely informed me that you have discontinued work on your contract* * * * I have to inform you that this contract * * * is hereby annulled, with the sanction of the Chief of Engineers, and that arrangements will be made to secure the performance of the uncompleted work in accordance with paragraph 4 of the contract. (R. 24.) (Italics ours.)

If appellant had not unequivocally abandoned the work, it most assuredly would have replied to this letter for the purpose of informing the Chief of Engineers that he had misapprehended appellant's advice of February 28, 1913.

Viewed in the light of the then existing conditions, as to the actual cessation of work on this contract by appellant, the letter dated November 1, 1912, must be construed as an unequivocal refusal to complete the work. This contention is

strengthened by the construction given to such letter by appellant in its later letter dated February 28, 1913.

The court found that appellant " requested the cancellation " of the contract.

The appellant in its letter stated that it submitted certain facts " in support of our position that the contract should be terminated," and in paragraph 3 of its letter it stated that " the contract should be discontinued and terminated." This shows that appellant intended that its previous letter should be considered as an absolute refusal to complete the contract and was a reiteration of such refusal. Nothing was then left to the Government but to consider what its rights were under the contract, and the Government then proceeded, after consideration not only by the engineer in charge but also by the Chief of Engineers, to declare the contract " annulled," as provided by paragraph 4 of the contract. We submit that this action upon the part of the appellant fills all the requirements as laid down in the decided cases, such as *Smoot's Case,* 15 Wall. 36, where, at page 48, this Court says:

> A mere assertion that the party will be unable to perform his contract is not sufficient. It must be a distinct and unequivocal refusal to perform the promise *and must be treated and acted upon as such by the party to whom the promise was made.* (Italics ours.)

To the same effect, see *Dingley* v. *Oler,* 117 U. S. 490, at page 503.

We have shown that the facts in this case meet the stringent requirements of the rule applicable to a purely anticipatory breach. However, it has been above shown that appellant both defaulted and refused to further perform the contract at a time when performance by appellant was due under said contract.

V

The contract having been "annulled," as provided therein, the Government was within its rights in applying the retained percentages to the cost of completing the work in excess of the contract price with appellant. The work relet was the work which appellant had agreed to perform

The appellant being in default in the performance of the contract, as hereinbefore shown, and having definitely and unequivocally refused to complete the performance thereof, the Government determined that the same should be "annulled," (R. 24) and gave notice to appellant to that effect, with the advice that—

> arrangements will be made to secure the performance of the uncompleted work in accordance with paragraph 4 of the contract. (R. 24.)

Paragraph 4 of the contract (R. 4) provided as follows:

> 4. If, in any event, the party of the second part shall delay or fail to commence with the delivery of the material or the perform-

ance of the work on the day specified herein, or *shall in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract,* then, in either case, the party of the first part, or his successor legally appointed, shall have power, with the sanction of the Chief of Engineers, to annul this contract by giving notice in writing to that effect to the party (or parties, or either of them) of the second part, *and upon the giving of such notice all payments to the party or parties of the second part under this contract shall cease, and all money and reserved percentage due or to become due the said party or parties of the second part, by reason of this contract, shall be retained by the party of the first part* until the final completion and acceptance of the work herein stipulated to be done; and the United States shall have the right to recover from the party of the second part whatever sums may be expended by the party of the first part in completing the said contract in excess of the price herein stipulated to be paid to the party of the second part for completing the same, and also all costs of inspection and superintendence incurred by the said United States, in excess of those payable by the United States during the period herein allowed for the completion of the contract by the party of the second part; *and the party of the first part may deduct all the above-mentioned sums out of or from the money or reserved per-*

> *centage as aforesaid;* and upon the giving of the said notice the party of the first part shall be authorized to proceed to secure the performance of the work or delivery of the materials, by contract or otherwise in accordance with law. (Italics ours.)

The Government on August 16, 1913, advertised the uncompleted part of the work "on the same specifications, surveys, and borings," and awarded a contract therefor to Eugene Breymann—

> at 26⅞ cents per cubic yard, scow measurement, contract dated October 10, 1913, who completed the work. The amount of material dredged by him was 1,328,257 cubic yards. (Finding XI, R. 25.)

The court below also found that the cost to the Government of the work done by Breymann under his contract was $356,969.07, which was $141,127.31 more than it would have cost the Government had appellant done the work in accordance with his contract, and that this sum was $107,129.16 more than the retained percentages sued for, which amounted to only $33,998.15.

Every step taken by the Government was precisely in accordance with the contract with appellant. Of course, the word "annulled," as it is used in the contract, is, as this Court has said, "ill-chosen." The Court, in the case of *United States* v. *O'Brien,* 220 U. S. 321, at page 328, said:

> The ill-chosen word "annulled" in the contract, repeated in the notice to the contractors and in the complaint, can not be

> taken literally in any of them. It means refuse to perform further, not rescind or avoid. *Philadelphia, Wilmington & Baltimore R. R. Co.* v. *Howard,* 13 How. 307, 340. For if the contract were made naught by the Government's election and notice, all rights under it would be at an end, whereas it provides in terms that rights shall rise upon annulment, which but for this provision in the contract the Government would not have.

However, the appellant contends that it does not appear that the uncompleted part of the work covered by the contractor's contracts had been completed under a new contract and specifications like the old. The rule upon this question was stated by this Court in the case of *United States* v. *McMullen,* 222 U. S. 460, where this Court, at pages 471 and 472, said:

> The objection that the second contractor does not appear to have completed the work intended to be accomplished by the first, that is to have made a channel of a certain depth, does not impress us. The first contract was for certain work for a certain object, but limited and subject to change as the appropriations might require. The second was for the same on the same plans and specifications, the only difference being in the parties, the price, and the liberty given to the second contractor to dump in deep water, which diminished the cost. In the first contract the Government reserved an absolute right of choice in this regard. Whether the object of

> the contract was attained is immaterial, *so long as the work done towards it was work that the first contractor had agreed to perform.* (Italics ours.)

The above decision is discussed and approved in *United States* v. *Axman,* 234 U. S. 37.

The Court of Claims found (R. 25) that "*the uncompleted part of the work*" covered by the two old contracts was relet. This shows that the *work* done under the new contract was that called for by the old. It also found that the work was relet "on the same specifications." If the work to be done and the specifications as to the details of performance were the same, it is established that the additional cost incurred was for work which the original contractor had agreed to do. Finding XI (R. 25) punctures the claim that there was any variation between the old and the new contracts in respect to the work required to be done and the manner of performing it.

The change in the parties, the price, and other details is not material, as the work which Breymann did was all work which appellant was required under its contract to perform.

CONCLUSION

It is therefore respectfully submitted that the appellant defaulted in the execution of its contract; that by notice it unequivocally refused to complete the contract; that in accordance with the provisions of the contract the Government determined to pro-

ceed no further with the same and to avail itself of the right provided by the contract in such contingencies; that the Government, strictly in accordance with the terms of the contract, after proper advertisement and notice, relet to another contractor the work which appellant should have performed, and applied the retained percentages to the difference between what the work cost the Government under the new contract and what it would have cost the Government had the appellant performed the same as it had agreed.

Respectfully submitted.

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NOVEMBER, 1925.

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